In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 28, 1970—Murphy's petition for writ of habeas corpus filed in U. S. District Court for the District of Oregon.

Mar. 11, 1971—Pre-trial stipulation and order entered, superseding pleadings.

June 2, 1971—Opinion and judgment of District Court entered, dismissing petition.

June 11, 1971—Murphy's notice of appeal filed.

May 30, 1972—Opinion and judgment of U. S. Court of Appeals for the Ninth Circuit entered, reversing District Court.

June 12, 1972—Cupp's petition for rehearing filed.

July 6, 1972—Petition for rehearing denied.

Aug. 7, 1972—Cupp's petition for writ of certiorari filed.

Dec. 4, 1972—Certiorari granted.

PRE-TRIAL STIPULATION AND ORDER

[Names of counsel omitted in printing]

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DANIEL P. MURPHY, Petitioner, vs. HOYT C. CUPP, Superintendent Oregon State Penitentiary, Respondent.	)))))	Civil No. 70-883 Pre-Trial Stipulation and Order

JURISDICTION

The parties agree that the United States District Court for the District of Oregon has jurisdiction over the above captioned case by virtue of 28 USC section 2241 to 2254 and the Constitution of the United States.

AGREED FACTS

1. Petitioner is in custody of respondent pursuant to a 15-year sentence of the Circuit Court for Multnomah County on a conviction of murder in the second degree after trial by jury. This conviction was affirmed by the Court of Appeals of the State of Oregon on the merits. Timely petition for review was denied by the Oregon Supreme Court and the Supreme Court of the United States denied a timely petition for certiorari.

2. Petitioner's contention in this proceeding was raised in each of the above courts and petitioner has exhausted his state remedies.

PETITIONER'S CONTENTIONS

1. Petitioner's fingernails were unlawfully scraped and the scrapings seized by police, without a warrant, without his consent, not incident to an arrest, without probable cause to arrest or search, in the hope of finding evidence not known to exist, which scrapings were later determined to be evidence of guilt and used by the State at his trial to obtain his conviction.

2. This conviction so obtained violated the due process clause, section 1, Fourteenth Amendment, United States Constitution.

RESPONDENT'S CONTENTION

1. Denies that the scraping, seizure and use of the evidence so obtained at petitioner's trial violated petitioner's constitutional right to due process of law.

ISSUE OF LAW

1. Whether the action of the police in obtaining this evidence in this manner and its use at the trial to obtain petitioner's conviction violated petitioner's constitutional right to due process of law under section 1, Fourteenth Amendment, United States Constitution.

EXHIBITS

The following exhibits may be received without further authentication:

Petitioner's 1. Transcript in Circuit Court
2. Petition for Certiorari

Respondent's 11. [sic]
12. [sic]

The foregoing constitutes the pre-trial order in the above cause, the pleadings pass out of the case and are superseded by this order, which shall not be amended except by consent of the parties or by order of the Court to prevent manifest injustice.

Dated this 11th day of March, 1971.

/s/ Gus J. Solomon
United States District Judge

STIPULATED AND APPROVED.

/s/ Howard R. Lonergan
Attorney for Petitioner

/s/ Jim G. Russell
of Attorneys for Respondent

/s/ Daniel P. Murphy
Petitioner

Presented by:

/s/ Howard R. Lonergan

EXHIBIT NO. 1—TRANSCRIPT OF MURPHY'S STATE COURT TRIAL (excerpts)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,)
)
Plaintiff,)
)
vs.) No. C-49322
)
DANIEL PAUL MURPHY,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

[**(a) Hearing on Motion To Suppress Evidence**]

[December 11, 1967]

[2]

(Whereupon the following proceedings were had in camera:)

THE COURT: Gentlemen, at this time the Court is going to entertain argument on defendant's motion to suppress, which was filed last Friday.

I want the record to show that the Court has decided to hear this motion in what I refer to as open chambers, rather than open court, because of the nature of the motion. The motion is directed at what I feel is damaging evidence, as indicated by the memoranda filed by respective counsel. And, should the motion be allowed,

I do not want to take the chance, so to speak, of somebody drifting in the courtroom. I have no idea how long the motion will take, whether it will call for testimony in addition to the memoranda, and, for that reason, I don't—I want to protect against any possibility of somebody walking in the courtroom. There may be a stray juror, not in the case, which we can't screen, so to speak, don't have the time to do it, or somebody else who, in turn, might pass on what happened in the courtroom. So, for that reason, I feel that the matter should be disposed of here. If there's any objection by counsel, I'll entertain it at this time. Mr. MacLaren?

MR. MacLAREN: The defense has no

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objection, Your Honor.

THE COURT: Mr. District Attorney?

MR. O'DELL: None at all.

THE COURT: All right. Now, I have read, as I heretofore said, memoranda of both counsel here. And it seems to me that the facts are pretty well agreed to between the attorneys, and this is going to resolve itself into a question of law.

I think probably that Mr. MacLaren's position here that, if there's a search under circumstances such as this, without a warrant, raises a prima facie question of its unconstitutionality, therefore, the State should proceed and satisfy the Court that their motion should not be allowed. I'm not indicating that's a burden of proof, but I think, at least, it's a procedural method to proceed

with, who has the burden of going forward under the circumstances.

Now, you indicated, Mr. District Attorney,—Mr. O'Dell, in view of the fact there's two of you here, for the record—that probably you and Mr. MacLaren would discuss this matter before appearing here this morning, and to narrow the issues.

MR. O'DELL: I was going to, but he was tied up with a person and I wasn't able to talk with him.

THE COURT: All right. Are my remarks thus far, are they pretty well—is that true?

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MR. MacLAREN: Yes, Your Honor.

MR. O'DELL: Fairly well accurate.

THE COURT: All right.

MR. O'DELL: I assume that you've read the Statement of Facts as set forth in my memorandum.

MR. MacLAREN: Yes.

MR. O'DELL: Do you agree primarily with those, or do you take issue with those?

MR. MacLAREN: For the purpose of this argument on the motion, I think they're accurate and—

THE COURT: Do I understand—there's one thing that's been bothering me, but I think I understand from both the attorneys' memoranda, that the State had already determined that the deceased met her death by strangulation before this search was made. Is that right?

MR. MacLAREN: Yes.

MR. O'DELL: That's correct.

THE COURT: Well, go ahead.

MR. O'DELL: Yes. Well, Your Honor, I can call witnesses to establish points which may be outside of the Statements of Fact and I would do so.

THE COURT: Well, I'm just wondering what we'd need.

MR. O'DELL: But, based upon the Statement of Facts, which is before the Court, and on the

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memorandum, I would urge that this is the type of search, or investigation, if you will, if in fact it is a search, which should be allowed under all of the attending circumstances of this particular case.

THE COURT: All right.

MR. O'DELL: I would simply urge that this is a search based upon probable cause. And, while the two main categories of searches are those incident to the existence of a warrant based upon a valid affidavit, and those others incident to a lawful arrest, I state that there is a third category upon which a search can be carried out without violating the United States Constitution or that of the State of Oregon, and that is, a search based upon probable cause. I would urge that the Court's function, main problem, in this case is to determine whether or not there was probable cause for the officers to act.

Now, the Fourteenth Amendment, the test set down under the wording of the Fourteenth Amendment, is "There will be no unreasonable . . .", and reasonable-

ness is the test through which every search must stand, whether or not there is an arrest and whether or not there is a warrant, and looking at the totality of the arrest. And the knowledge of the officers at the time they confronted Mr. Murphy at the Portland Police Station, in the presence of counsel, their actions based upon the totality of the facts and their

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knowledge at that time, was no more than reasonable. And, if the Court finds that the search was reasonable based upon probable cause, we maintain that the Constitutional guarantees have been met.

Now, in this particular case, the nature of the evidence that was sought by the police officers can be readily seen by the Court to be that which is easily destroyed. The Statement of Facts indicates that he was requested to give fingernail samplings. At this point the defendant had notice of what we intended to obtain, and a warrant was not obtainable under those circumstances. This evidence is easily secreted or destroyed by a simple method of cleaning one's fingernails.

Now, there are many cases which allow more latitude and broader interpretations of the rules of search, where the evidence is highly mobile or capable of being put without the reach of police officers easily. But, in essence, the nub of the whole thing is whether or not police officers are going to be forced to arrest when probable cause exists; are they going to risk further investigation; are they going to risk this being taken from their grasp because they failed to arrest.

THE COURT: What time was this search made?

MR. O'DELL: It was made in the evening hours. And —Counsel was there. I would assume it was

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around nine o'clock or so.

THE COURT: It was after court hours, general court hours?

MR. O'DELL: Yes. Mr. Murphy did not return from his place, Metolius River, until after court hours.

THE COURT: All right.

MR. O'DELL: And it was around, to the best of my recollection, eight-thirty, nine o'clock. That's my best guess.

THE COURT: All right, go ahead.

MR. O'DELL: And the officers would have been derelict in their duty had they done any other thing based upon their knowledge at the crime scene. As the evidence will show, the throat was lacerated by, what the doctor termed, those characteristics left by fingernails. We knew Mr. Murphy was at the scene. We knew at this time we were in the possession of the fact that similar attacks had been made in the past upon Mrs. Murphy of this particular type. We were in the possession of the facts that he was there; he was seen removing himself from the scene in a suspicious manner, in that he pushed his vehicle out of the driveway prior to starting it, it was a noisy vehicle; we knew that he hadn't been there for an extended period of time, perhaps three months; and we knew that the relationship was strained

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between the parties.

We have every reason to believe, based upon our investigation at this point, that this man committed the crime of murder. Now, based upon this knowledge being in the mind of the police officers, at this time, we feel it was reasonable for him to act as he did. We're not claiming that, when a person is found dead and strangled, that a police officer can go down the street taking fingernail samplings from the public at large. But we have a prime suspect; we knew there was a crime committed, and we have probable cause to believe this man committed it. We have the right to obtain evidence based upon probable cause.

THE COURT: I won't argue with you. I feel quite strongly there's probable cause under the circumstances, what you've indicated, and what has not been opposed by Mr. MacLaren thus far. I mean, here is the decedent found in her home and her husband had been there the night before, and evidence, as you say, of prior incompatibility, and this strong—strong grounds for probable cause. I'm not concerned about it under the circumstances here.

And there's exigencies of the situation here; demanded immediate action, I would think, almost urgent action, as far as the—following the general practice, and the better practice, to go before a police officer and get a warrant. But, as the laws indicate, I think you have to take into it

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so many things, the nature of the crime, the seriousness of the crime here, and the manner

in which it was committed, which would lead to a search for this type of evidence. And the purpose of the search and, as I indicated, the exigencies of the situation, as you indicated, there's evidence that could be destroyed momentarily.

But, go ahead. I think, Mr. MacLaren, as I understand, your position is that, in the absence of the arrest, though, there may be probable cause, but there wasn't an arrest here so, therefore, the search cannot be made because it wasn't incident to an arrest. That's one of your strong grounds, is it not?

MR. MacLAREN: My argument is this: The Constitution forbids any kind of a search without a warrant. The cases have come down. There are exceptions. There are two I can think of. One is incident to an arrest. There's no arrest here.

This emergency situation here, Counsel cannot come forward and show the Court a case and say this is that type of emergency situation. The officer had possession of that knowledge all during that day, Your Honor. They knew all this.

Now, the Court may be impressed by the idea this happened in the evening. Well, I know the Court is aware that magistrates are available at all times for the issuance

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of search warrants. Now, when I was in the District Attorney's office, many occasions I went down to the Police Station at late hours, talked to the officers,

and it looked like there was enough here for a search warrant, we sought out one of the judges. I found Judge Labadie is always available.

I think, if the Court allows this type of thing here, you might as well strike out the last part in the Oregon Constitution that talks about search warrants because, if you allow the officers to search without a warrant, and without it being incident to a lawful arrest, why even have a search warrant. They can say, "Well, we just had to do it, Your Honor." But I think the language in State versus Chinn [231 Or. 259, 373 P.2d 392 (1963),] is just what the Court—magistrates rather than police officers are to decide what and when the privacy of the home is to be disturbed. Of course, the Constitution puts, as I pointed out in here, the person is entitled to the same protection as his home. There can't be any argument about that.

There isn't any reason in the world, if they feel they had probable cause, they didn't see fit to make an arrest at that time. They're making an investigation, an exploratory search. This is condemned by all of the cases. I'll agree that Counsel's got some good logic here, but it's not supported by the law. The law is to the effect that, in

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Oregon, you have to have a search warrant, except where there's a search incident to a lawful arrest. If they had arrested the man incident to that, they'd done that, I think probably we wouldn't have too much to argue about.

THE COURT: Let me ask you this: What do you think about Justice Goodwin's remarks in the Krogness case, [*State v. Krogness*, 238 Or. 135, 388 P.2d 120 (1963),] where, here you had no question, you objected, you as the counsel objected and the defendant objected, to a search being made to the person? Right?

MR. MacLAREN: Right.

THE COURT: Then they went ahead and did it anyway. Doesn't that constitute an arrest, wouldn't you say, without the—

MR. MacLAREN: I would think not, Your Honor. Even if it did, as they point out in Chinn, as a general exploratory search accompanied by an arrest upon some convenient charge, even if you say he was detained here and this was an arrest, and this was incident to it, if he was—the reason for the detention was for the search. Just like they're talking about here, like you stop a man out on a street on a traffic charge, some burglary detectives stop him,—

THE COURT: Except you absent the element of probable cause though, so it's more than just a search—we do have probable cause, I feel there is probable cause

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here.

MR. MacLAREN: Maybe the magistrate would feel that, too, Your Honor, but we do not know because—

THE COURT: I mean, proper vehicle to go along with the reasonable suspicion.

MR. MacLAREN: The Court is, of course, aware of

the evidence that did develop, and I don't think that can be allowed to bolster up the case. The man was there—

THE COURT: All right. Well, you know what I'm doing. I want to hear some argument here. And you both submitted—

MR. MacLAREN: Well, I appreciate that, Your Honor.

THE COURT: —your written memoranda. And, what I'm going to do in this case,—and I'm not foreclosing any further argument. Mr. Tanzer's here, if you want to be heard (to Mr. Tanzer). Or, if your partner is here, likewise, he can be heard, put it in the record (to Mr. MacLaren). My feeling is, the facts are stipulated to, I'm just going to get this matter—everything in the record you want to put in here, and the argument. I'm going to reserve ruling on this and direct you to proceed on voir dire of this jury.

And I also direct you—I don't think it's necessary,

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but it would certainly be in opening statement, if I deny to it, you will have to refer to it in opening statement—but, in voir dire, I don't think any counsel has to make comment on this matter. That would give me time to study this matter at least the rest of the day.

MR. MacLAREN: One more thing, Your Honor. I don't think Mr. O'Dell will raise this. There's no issue as to the timeliness of the motion. Is that correct?

MR. O'DELL: That's correct. I told counsel I wouldn't object.

THE COURT: Fine. I wouldn't think so in a case like this. That's all right. It came in Friday, but that's fine.

MR. MacLAREN: We had a couple days.

THE COURT: Mr. Tanzer, do you wish to add anything to the legal aspect?

MR. TANZER: I'd like to counter Mr. MacLaren's argument a little. I brought along the case State versus Ramon [, 248 Or. 96, 432 P.2d 507 (1967)]. It quotes from the Robinowitz [sic] cited last spring in Cooper versus California [, 386 U.S. 58 (1967),] by the U. S. Supreme Court, and the Oregon Court adopts, in a situation which is really a pure probable cause search without a warrant two days after the arrest, that it's not incident to the arrest. That was a search of a car, but they cited this. But they cited this Robinowitz language, which is pertinent to Mr. MacLaren's

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argument that you have to have a warrant, and there might have been a magistrate around. So it says that the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.

And there Mr. MacLaren's argument, which Justice O'Connell still holds with, in the minority, comes from an old case called Trupiano [v. United States, 334 U.S. 699 (1948)], which did hold, if at all possible to get a

warrant, you had to go get it. But that's expressly reversed in this Robinowitz case.

I'll show you the Ramon case, if you wish (handing to the Court) and this idea about the arrest; the language I read is bracketed there.

In that case, during a surveillance, the officer—it was a surveillance of narcotics case. And the officer spotted what he thought were probably marijuana flakes in the back seat of an automobile. He saw it through the window. They arrested the defendant and took the car down to the station and, two days later, they searched the car without a warrant, two days after the arrest. This was the holding.

When he says, too, we should have arrested if we wanted to search, why, I'd refer you to the case of Hoffa versus United States [, 385 U.S. 293 (1966)], which is in the most recent U. S. Supreme Court Reports. It says simply that there's no Constitutional right to be arrested. But it says more. It recognizes that

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there are instances where police may have to arrest on probable cause, but it says that, certainly, in proper cases, it recognizes that that's not a good time to arrest; that, while they may have probable cause, it's certainly not enough to go to a jury,—

THE COURT: All right.

MR. TANZER: —and they should have allotted time to continue their investigation.

THE COURT: I'm aware of that.

MR. O'DELL: That, I believe, is set out in that memorandum.

THE COURT: Yes.

MR. MacLAREN: Let me ask you this, Mr. Tanzer: Is there any case, that you're aware of, that says there may be a search made without a warrant, without an arrest, and, I think, without these emergency circumstances? Is there any such case?

MR. TANZER: Well, I think Ramon is one. I've seen the cases that say all searches have to be either with warrant or—or incident to arrest, and—and, yet, I've not seen any of those cases that actually dealt with a straight probable cause search and threw it out, you see.

MR. MacLAREN: Or held it in.

MR. TANZER: Or held it in, either way.

THE COURT: I think so. I think that's

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what the Court's faced with here this morning.

MR. O'DELL: That's correct.

THE COURT: Under the circumstances of this case, as I said before, the exigencies, and seriousness of it, the purpose of the search, even the evidence obtained, this isn't just somebody's checkbook or something, this is real damaging evidence, as I indicated. That's why I'm holding this in Chambers here because, if the State's theory —if this ties up, I'm not secondguessing, but, for the purpose of this argument, it appears to be where the murder was accomplished in this manner.

MR. O'DELL: There's a couple other points I'd like

to answer in Mr. MacLaren's argument. He stated, number one, that this was—there was no arrest performed; that, had there been an arrest performed, that we probably wouldn't be here. That's really the nub of the question: Is there a duty of the police upon the arriving at probable cause?

As Mr. Tanzer stated, and my brief states, Hoffa is there. We could have made in this case a convenient arrest. The facts don't state it, but I think I could adduce testimony to the fact that he had been drinking, and he was in a public place.

We got away—we're getting away from this arresting on a citation for an improper left turn, or from drunk in a

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public place, in order to give the facade of validity of it. This has been criticized. An arrest for convenience could have been made. I'll put it for the record. It's been bad practice, agreed to by counsel.

THE COURT: And the Courts, too. At least by this Court.

MR. O'DELL: This was not made in this case. Also the evidence, and I could produce testimony to this effect, which does not show in the brief, Detective Hutchins noticed, prior to requesting the fingernail scrapings, under the thumb of the defendant, a black glob of something. He doesn't know what that is, but, again, put in the context of the framework of the facts of this case.

he says, "Aha," and asked for the fingernail scrapings at that point. So we do even have partial application of the plain view doctrine.

THE COURT: All right. Yes. Of course, I think this was search though. I'm not being arbitrary on that point. I think there's a search.

MR. O'DELL: There's one other matter, if I might. Now, the Court wishes to take time on this; it's a weighty matter, I understand that. However, if I could request, I would, before placing the defendant in jeopardy, as such, I would, in the event the motion's not allowed—it would require some serious consultation with my office—and, before placing the defendant in jeopardy, technically, by

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calling a witness, or wherever jeopardy attaches nowadays, I would like to avoid that, if I might, prior to obtaining a ruling.

THE COURT: It's my feeling just voir dire of the jury isn't putting him in jeopardy.

MR. O'DELL: I don't know. Swearing them certainly is. Swearing the jury is.

THE COURT: Swearing the jury is.

MR. TANZER: I don't know if jeopardy attaches when you call a jury or not.

THE COURT: Gentlemen, I assume we'll be spending the day picking the jury here. I expect a determination on it before tomorrow morning. So, if I haven't got

my mind made up this afternoon, we'll just recess wherever we are before we swear the jury.

MR. O'DELL: Is there any objection to that, Counsel?

MR. MacLAREN: No, it's just a—

THE COURT: I want to spend some time on this matter.

MR. MacLAREN: Certainly. I think the matter—it'll work out we'll be busy right up 'til five on the voir dire and the jury won't be sworn 'til tomorrow in any event.

THE COURT: As I say, it's four o'clock.

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Looks like you'll be through with your pre-emptories and everything. I'll recess until tomorrow morning and we'll have a decision, if not before.

MR. O'DELL: I understand, certainly.

THE COURT: That's just a general pattern. One other thing—two other things, for the record. I think, Mr. District Attorney, you'll stipulate the defendant actually wasn't arrested for about a month. Is that right?

MR. O'DELL: He was arrested as a result of a warrant from a Grand Jury indictment. And I believe it was September—I set it forth in my memorandum, I thought.

MR. MacLAREN: Approximately a month.

MR. O'DELL: Approximately September 22nd, 1967.

THE COURT: Now, was there any reason for waiting that long? For the record, Mr. MacLaren's made

an issue of the fact that you waited that long. Of course, you've argued there's no Constitutional right to be arrested. But, as I recall, and it's a matter of record here, that the defendant had four children at home, did he not? Was that given some consideration?

MR. O'DELL: If the Court wants the honest reason for waiting that long, we felt that, after all the facts were gathered, that we had a case. I talked to Mr. MacLaren, personally. I'm sure he'll recognize this. He

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knew it was going to Grand Jury, and I knew it was going to Grand Jury. He simply asked me to keep him informed of the progress because of the business situations. That's the reason we didn't go out and call him later.

THE COURT: I just think there should be something in the record. Another thing: What time of the day did you determine that the victim was strangled?

MR. O'DELL: Well, this was apparent, Your Honor, upon arriving at the scene,—

THE COURT: Oh.

MR. O'DELL: —even to the layman. However, Dr. Brady did not come out with his conclusions, as I recall, —now, Mr. Barton was on our case for the office during the day, but, as I—to the best of my recollection, we had the official determination of this around midafternoon.

MR. MacLAREN: You had probable cause to believe that she'd been strangled about eight a. m.

MR. O'DELL: Precisely. As I said, upon arrival at the scene, a layman would be able to speculate she had been strangled.

THE COURT: Beyond the field of speculation, it wasn't until later that you got the coroner's report that you had—

MR. O'DELL: It was midafternoon when we

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had the official word of the cause of death.

MR. TANZER: And the defendant was down in Southern Oregon. That caused the time—

MR. O'DELL: He was clear on the Metolius River and he didn't return until eight or so in the evening.

THE COURT: I know. Mr. MacLaren's made a strong point here, that you did have a probable cause in the middle of the afternoon; that you already had a professional opinion on it that it was strangulation; and there was evidence on the neck, I think came out in the other hearing Wednesday, that the neck had been cut, therefore, whoever did it would—in all probability, may have had some evidence under the fingernail.

MR. O'DELL: That's true. There was other evidence which were accumulated throughout the day, during the day and throughout the day, that gave us the totality of the facts. The defendant, for instance: We didn't do this until we got a complete neighborhood background.

THE COURT: That's what I'm getting at. Oh, I see. You may have known the strangulation. Until the pres-

ence of evidence outside of the bedroom of, probably, a prowler,—

MR. O'DELL: We had evidence at that point which had thrown us off the track, and we didn't gather all

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this evidence together until later in the day.

MR. MacLAREN: By five.

MR. O'DELL: I can't actually tell you.

THE DEFENDANT: My son knew where I was, as soon as the police arrived there.

MR. MacLAREN: Well, Your Honor, if the Court is, in making its decision, placing weight on the sequence of time that day, I think maybe we ought to go into that. I'm not, for a moment, tending to impune Mr. O'Dell, but I don't think we exactly know when everything happened that day, from your knowledge or mine. Do we, Mr. O'Dell?

MR. O'DELL: No, nor do I think, in the collective mind of police officers, we'll be able to pin down each event as to hour.

MR. MacLAREN: Well, if the Court is going to put some weight on whether or not the police had their probable cause, such as it was, during the normal judicial hours, I think maybe we ought to inquire into that at some greater length.

THE COURT: You're urging that, aren't you?

MR. MacLaren: That's my position. If they knew as much by nine o'clock, they knew as much by five o'clock.

MR. O'DELL: Your Honor, particularly based upon the October 13th case of Ramon, this is not even

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relevant.

THE COURT: I know. Mr. Tanzer just finished—

MR. MacLAREN: This is one of the elements, I think, going to reasonableness, don't you, Mr. O'Dell?

MR. O'DELL: Not at all; not at all.

THE COURT: No. I see the State's position. No. I mean, the mere formality of getting the warrant because, let's be frank about it, it doesn't take much to get a warrant from a magistrate.

MR. MacLAREN: Your Honor, the Constitution isn't a mere formality. That's our position. You can't do it without going before a magistrate.

THE COURT: I understand; I understand your authority for it. And the question is whether they can under the circumstances attendant to this search.

MR. TANZER: I think the question is, isn't it: Once the defendant is there and the police officers are there, and, at that time, regardless of when it accrued, there was probable cause. And the question then is, from that point, was it reasonable for them to act as they did,—

MR. MacLAREN: Well,—

MR. TANZER: —rather than at what point they might have had sufficient to bring it before a magistrate.

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MR. MacLAREN: Well,—

MR. TANZER: In other words, given the facts that

did exist, rather than—rather than searching backwards for, you know, various points of time,—

THE COURT: Well, do you have Detective Hutchins here now?

MR. O'DELL: Certainly available, Your Honor.

THE COURT: Do you want some more evidence in here?

MR. MacLAREN: Well, it's up to the Court. If the Court is not inclined to be impressed by the fact that they had probable cause, if they had it, by five o'clock, during judicial hours, then I don't see any point in it; but, if the Court is impressed with this thought that part of the reasonableness test arises of when the officers could have got a warrant, and I don't think there's any case that you just don't need a warrant any more, that's pretty basic,—

MR. O'DELL: Well, we still maintain the basic test is reasonableness, and that's what the Constitution uses, that word very clearly, and certainly been adopted by the Oregon Supreme Court as recently as October of this year.

THE COURT: All right, that's fine. But, Mr. O'Dell, then I can conceive a situation where you have

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all the reasonableness you have at four o'clock in the afternoon. Probable cause, reasonableness, whatever you want to call it; they're used interchangeably. And crime has been committed; you have knowledge of that. You have knowledge of how it's committed

and so forth. Are we going to say, if we got all that, why bother to go down and get a warrant from the magistrate, if we're satisfied with probable cause, and a search is reasonable? I'm going to start pressing that way because—

MR. MacLAREN: That's just what that Chinn case says. Magistrates are supposed to say probable cause, not the policemen.

THE COURT: If there was, in fact, probable cause. That's your point.

MR. MacLAREN: Well, I think in retrospect, Your Honor, you can't go back now, say, "Well, it's okay fellas. You didn't have to get a warrant because you—after all, look what you found."

THE COURT: What time did the defendant arrive at the police station? It was after five o'clock. Right?

MR. MacLAREN: Seven, seven-thirty, something like that.

MR. O'DELL: Between seven and eight would be the—in that hour.

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THE COURT: All right. Of course, you didn't even know then that he was coming until he appeared. Right?

MR. O'DELL: That's correct.

THE COURT: I mean, he wasn't—he came in voluntarily, as I understand it.

MR. O'DELL: He came in at our request, yes.

MR. MacLAREN: Well, the request was made and,

as far as you knew, he was on his way over. Isn't that correct?

MR. O'DELL: That's correct.

THE COURT: Well, I think we ought to have a little bit here in the record of Detective Hutchins. I mean, when did the officers desire that, or even think about searching this man? I think you indicated he didn't—one factor was that he waited until he arrived, then he thought he saw a blush of blood there that may have given thought of blood at that time.

MR. O'DELL: I'll be glad to see if he's here, Your Honor.

THE COURT: Why don't you do that? I'd just like to have something in the record on that.

(Whereupon Mr. O'Dell left Chambers
and, upon his return,

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the proceedings continued as follows, to-wit:)

STATE'E TESTIMONY

[28]

WILLIAM H. PRUNK,

was thereupon produced as a witness on behalf of the State of Oregon and, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'DELL:

Q Now, for he record, Mr. Prunk, what's your occupation?

A Detective for the Portland Police Department.

Q And how long have you been a detective, or how long have you been a police officer?

A Fifteen years.

Q And you were the detective primarily assigned to investigate the death of Doris Murphy. Is that correct?

A Yes, it is.

Q And what time of day did you arrive on the scene?

A Shortly after eight a. m. It was about (referring to documents—pause)

THE COURT: Well, that's close enough for this purpose here. Was it in the morning?

THE WITNESS: Yes.

THE COURT: You recall definitely?

THE WITNESS: Between eight-ten and eight-thirty.

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THE COURT: All right.

Q (By Mr. O'Dell) Did you have an opportunity to view the body at that point?

A Yes, I did.

Q And I'm not asking you for a medical conclusion, but, from your experience, looking at the body, did you have a layman's opinion as to the cause of death?

A Well, there were marks on her—her throat, lacerations, and abrasions, that appeared that she'd been strangled.

Q Now, later on, this body was taken to the coroner, was it not?

A Yes, it was.

Q And do you recall what time that day, or when—do you recall when, if ever, you received word from the coroner as to the official cause of death? And, if so, try to approximate the time, if it occurred that day.

A Well, the coroner's representative, or deputy coroners, showed up about nine a. m.

Q I'm talking from the doctor himself.

A It was, I believe, the following day.

Q Oh. Now, I've set out here, and perhaps this might be for a correction of the record, in the Statement of Facts, that he had been seen by a witness arrive at the home, and the same witness saw him leave by pushing a truck from the driveway to the street before starting the engine.

[30]

Now, when did you come in possession of that fact from that witness?

A From that witness?

Q Yes.

A It was quite some time after that. I would say over a week.

Q Now, did you at any time during that day come in possession of that same knowledge?

A Yes, I did.

Q And from whom did you obtain that knowledge?

A The defendant.

Q And where did this conversation take place?

A The first time was a telephone conversation. He had telephoned from Camp Sherman to the Detective Office at four p. m.

Q Four p. m. on that day?

A On the day. It was August the 25th.

Q Did you obtain the information regarding the—his presence there at that time?

A Yes. He said that he had been in the driveway in his truck.

THE COURT: Now, wait a minute. He called, you say, the Police Station?

THE WITNESS: Yes.

THE COURT: Voluntarily, himself?

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THE WITNESS: Yes.

THE COURT: At four o'clock in the afternoon.

Q (By Mr. O'Dell) Had he called earlier—

THE DEFENDANT: Your Honor, there was a call there for me to call back.

THE COURT: All right now, just a minute. Just for the record, Mr. Murphy, I'm not—certainly, if you've got information that's vital to the determination of the issues before the Court, I'm certainly going to let it be known, but I suggest that you talk to your attorney.

MR. MacLAREN: Why don't you bring your chair over here, Dan?

THE DEFENDANT: (Complying.)

Q (By Mr. O'Dell) Now, had you earlier in the day determined, as a matter of fact, that the defendant was present at the home prior to four o'clock?

A No.

Q Now, did you have—And this was your first knowledge of that to be a fact. Is that right?

A That's right.

Q Now, during that conversation at four o'clock, had you attempted to contact the defendant earlier?

A Yes, we had.

Q And what method did you use?

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A We had made telephone calls to the resort where he supposedly was living, and a teletype message had been set out requesting that he be located for a death message, and so forth.

Q And your first contact with the defendant was when he returned your call. Is that correct?

A Yes.

Q And you state that was what time again?

A Four p. m.

Q And you stated that, prior to that, you had no actual knowledge that he was at the scene?

A Right. Well, we—we were led to believe, from a conversation with various people, that he had gone to Portland and was going to the—to the Murphy home. However, actually knowing that he was there until he told us that he was there, was the first time we knew about it.

Q Now, had you at this time contacted any other witnesses who saw him in the area prior to four o'clock that day?

A No.

Q Now, were you present when certain fingernail scrapings were taken?

A Yes, I was.

Q And do you recall approximately what time this occurred?

[33]

A I believe it was approximately ten p. m.

Q And who took those scrapings, if you remember?

A Detective Hutchins. I'm not sure on the time.

Q Were you present?

A Yes, I was.

Q And who else was present?

A Attorney Gordon MacLaren, the defendant, and, I believe, Attorney Lloyd Weeser—or, Weiser was his name? I don't know how to spell it.

Q Anyone else you can think of besides those you've mentioned?

A There may have been other detectives present. It's —it's a large office and they come and go; however, they weren't focused on the particular—

Q Was there a representative of our office present?

A Yes, Deputy District Attorney Brad Shiley was there.

Q Now, in your opinion as a police officer, based upon this investigation, when did your attention focus upon this defendant as having probably committed the crime you were investigating, when during that day, if at all?

A Well, I think probably after the conversation on the telephone with him at four p. m.

Q And were you—at that time had you been able to talk to all of the other detective teams that had been working on the matter?

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A No, we hadn't.

Q Now, could I recapitulate briefly what your knowledge was at the time? You knew that she was—probably had died of strangulation?

A Yes.

Q And that she had lacerations on her throat?

A Yes.

Q You had not received official determination of this from the coroner's office at that time?

A No.

Q You found out at four o'clock that day, based upon a conversation with the defendant, that he'd been in the area and had been in the driveway?

A Yes.

Q Now, at any time during the day did you make determination as to the marital relationship between the two?

A Yes. The son, who was present at the time the body was discovered, had told us that his mother and father had, on occasions, had fights.

Q Now, can you tell me about when you came in possession of this knowledge?

A This was before noon that day.

Q But at that time you did not know for a fact that he'd been in the area. Is that correct?

A Not for a fact, no.

[35]

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) Now, if you could, relate to the Court the best you can what information you did obtain that day after arriving at the scene, and the conversation with the defendant at four o'clock, and approximately when you obtained this information, to the best of your recollection?

A Well, on our arrival at the scene, we found that the victim was lying in her bed and, as I say, she had quite obviously been strangled, from the marks on her throat. There was no sign of a struggle of any kind, no evidence of robbery; hadn't been molested in any way. She was in an unusual neat-appearing situation. The bed was made to perfection. Her bed undergarments and so forth were placed about the room, folded up very neatly. And there was obviously no signs of robbery.

Discussing with the Pat Murphy, the boy who had discovered his mother, it was learned that the father had been expected in town and had, in fact, phoned the night before that he was coming in. It was also learned that he hadn't been there for quite some time; and that the boy went to bed early that evening so as not to see his father; they didn't get along well; and that he and

the—the defendant and the wife had not gotten along too well.

[36]

Q Now, outside of just investigating the scene itself, what else did you do that day?

A We attempted to contact the people in the neighborhood where we found that the one party who, we were later told by Murphy, had seen him in the driveway, or at least he thought that she had seen him, had left on vacation and was somewhere in Montana. We talked to several of the other neighbors who knew of the Murphys' marital problems.

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) What did they say?

A Well, as I recall, one of them stated that they had been separated for quite some time, and also at one time there was a divorce talked about; however, due to their religion, this didn't come about. Also the son, Pat, had told us that his father had been involved in a fight with his mother one time in the bathroom; and that the Venetian blinds were broken; and that, as a result, the mother had a bad mark on her throat when the fight was over with.

Q Now, can you think of anything else that you did, or acquired about this case, during the day prior to the telephone conversation, outside of just general investi-

gation of the scene, mapping and marking and drawing diagrams, that sort of thing?

[37]

A No.

Q Now, it's already established that you talked to the defendant at four o'clock,—

A Yes.

Q —and that he had returned your call.

A Yes.

Q What was that conversation?

A He asked if his wife was, in fact, dead. And, when I told him that she was, he immediately went into this story about what he had done the evening prior to and the following day after the murder. He wasn't asked what he'd been doing; he just started telling me.

Q What did he tell you?

A He said that he'd left Camp Sherman about eight o'clock on the 24th in his old pickup truck to bring a washing machine into Portland to be repaired. On the way he'd stopped at the Keg and Platter, which was a cocktail lounge on the Salem Highway; and that he'd had a couple refreshers, and he'd talked to the accordianist and the accordianist would probably remember him.

He said he got to his home in Portland and he pulled in the driveway. He'd been drinking, and it was quite late. And the door was locked, and he didn't want to go in to disturb his wife or wake anyone up so he slept in

his pickup truck there in the driveway for a period of the evening

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or early morning. And then later he tried to push his truck out of the driveway because it made a lotta noise and he didn't want to start it up and wake up his wife or anyone in the area. So he tried to push the truck out of the driveway, but it hit against a step or a curbing and he couldn't get it out and finally had to start it up.

And then he drove up to the Sombrero on Hawthorne and pulled around the corner, and he said he again pulled off to the side of the road and slept in the pickup truck until it was daylight.

Then he took his washing machine in to be repaired at the Division Street—or Division Repair Service, and drove around Portland taking care of some business; that he did not have a—well, on this telephone conversation, let me see—that he had just arrived back at Camp Sherman, this being four p. m., and that they had told him that his wife was dead.

This is about the extent of the telephone conversation. At this time we asked him if he could return to Portland, that there were certain things that we would like to discuss with him concerning this. He didn't ask me what had happened to her. He just said that he would come in.

Q Now, he did, in fact, then appear at the station later on. Is that correct?

A Yes, he did.

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Q Can you tell me about what time that was?

A He arrived at seven-forty-five p. m.

Q And eventually counsel was summoned. Is that right?

A Yes.

Q Now, was there—referring specifically to the fingernail scrapings, you state, to the best of your recollection, they were taken around ten o'clock.

A Yes.

Q Now, based upon your recollection of that day, can you tell me when, based upon the totality of these facts, the idea of securing fingernail-scraping evidence occurred to you?

A Well, it was between the time that he arrived at the Police Station and ten p. m.

Q And he arrived at seven-forty-five?

A Yes.

Q Now, referring to the actual taking of the conversa—of the fingernail scrapings itself, can you relate when the request was made, who made it, what they said, and what was said in response to that, please?

A Well, there was quite a time lapse between the time he arrived and the time that his attorney finally arrived. He called one attorney, and then another attorney for a criminal proceeding; the other didn't feel he wanted to handle—

THE COURT: Speak up, will you, so she can get it.

A The first attorney stated that he was more of a civil attorney and thought he should call another attorney. Finally, MacLaren arrived, and this was probably two hours after his first arrival at the scene. After discussing it with MacLaren, they were going to leave. And at this time we had discussed with Mr. Shiley taking fingernail scrapings.

Q Now, when did this discussion—when did that discussion take place?

A This was while Mr. MacLaren and Mr. Murphy and the other attorney were in an office at the Police Station discussing with Mr. Murphy the facts.

Q And what time did this conversation with Mr. Shiley take place?

A I would guess about nine-thirty. Possibly later.

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) Well, what made you desire to take the scrapings? What came out? What came up at his arrival at seven-forty-five which brought this idea to your mind, if anything?

A Well, the fact that he was there at the time we felt the murder had taken place, that at this point he had become

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a strong suspect.

Q This was on his arrival. Is that correct?

A Yes. We had discounted the son, after talking to

his son and listening to his story, and also the fact that the son had absolutely no fingernails. He bit his fingernails and his fingernails were well back into the quick. It would be impossible for him to scrape or anything with his fingernails. There were, as we said earlier, lacerations and abrasions on the throat, obviously made by something sharp like a fingernail.

THE COURT: When did you determine the son's fingernails probably weren't long enough to do this?

THE WITNESS: Well, almost immediately on our arrival, and talking to him. And he also came into the Police Station and gave us a court-reported statement and—

Q (By Mr. O'Dell) Can you recall what time of day that occurred, if you know?

A This was shortly before noon.

THE COURT: Well, Detective, early in the investigation you started looking at the boy's fingernails, which is good police work right off the bat, because it looked like strangulation to you. What I can't understand, at four o'clock, when the defendant called you, didn't it occur to you then that probably you were going to look at his fingernails as soon as he came in?

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THE WITNESS: Well, not at that time, it didn't.

THE COURT: It didn't, huh? All right. It was late in the evening until you got the thought, "Well, we better get some scrapings." Is that it?

THE WITNESS: Well, at this time we didn't know

for sure he had been there. He had supposedly left to go there, but there was no indication that he had actually arrived.

THE COURT: Yes, until four o'clock.

THE WITNESS: Yeah.

THE COURT: He admitted it at that time. And the question before the Court: Before the magistrate left that day—they're usually there at five o'clock, at least that's the legal hour the courts are open, according to our statutes—why didn't you ask for a search warrant then?

THE WITNESS: Well, we hadn't heard his side of the story at all, other than the fact that he had come to Portland. And, after he had absolutely refused to discuss the case with us in any way, shape, or form, on the advice of his attorney, we didn't think this was the actions of an innocent man.

THE COURT: Oh. All right.

THE WITNESS: And normally would want to

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know what happened to his wife.

THE COURT: All right.

THE WITNESS: He didn't discuss what had happened to her or anything about it. He just (pause)

MR. O'DELL: I—I—I believe that pretty well frames the day.

THE COURT: All right. Mr. MacLaren, do you have any questions?

MR. MacLAREN: Let me just ask you one thing to start with.

CROSS-EXAMINATION

BY MR. MacLAREN:

Q When you first called over there, isn't it a fact, Detective Prunk, that you told the people at Metolius Resort that you suspected strangulation to be the cause of death?

A No, I think I said we felt she had been murdered.

Q Are you sure you never mentioned strangulation?

A I don't recall that I did.

Q On either of the calls to them?

A Now, on the first call to the resort, this was made by the coroner's office representative, and I didn't talk to them on that occasion.

Q On how many occasions on that day did you talk to anybody, other than Mr. Murphy, at the resort?

[44]

A I called once about noon, I believe, and then—

Q And who did you talk to on that occasion?

A On one occasion I talked to Mark Jones, who was the boy staying there at the resort, and then later on in the day I again called and talked to Mr. Tucker.

Q On your occasion when you talked to Mark Jones, are you positive you didn't tell him that you suspected strangulation?

A If I did, I don't recall it.

Q But you may have?

A I'm almost sure that I said murder.

Q All right. Now, between eight-ten and eight-thirty a. m. that day you discovered that you—what you termed to be a suspected strangulation. Is that correct?

A Yes.

Q You determined that there were marks to the extent of skin being broken at that time?

A Yes.

Q Did you determine that these were the type of marks possibly left by a person with fingernails?

A Yes.

Q And is it true that the first person you discussed the case with, other than the members of the department, was Pat Murphy?

A Yes.

[45]

Q And didn't you determine from you at that time, probably by, say, nine o'clock, that he expected his father was coming in the prior evening?

A Yes.

Q And didn't you determine from him that time, during the preceding night, Pat Murphy had heard a truck out in the driveway?

A He had heard something in the driveway, yes.

Q Didn't you determine from him that Pat thought it was his dad that had come home?

A He didn't say that.

Q He didn't say that at all?

A No.

Q Did you ask him who he thought it was?

A Yes.

Q And what did he say?

A He said he didn't know.

Q Now,—but you did know there was a vehicle in the driveway at that time, or something that sounded like it?

A Yes.

Q And you knew that Mr. Murphy was expected to come home that night?

A Yes.

Q And that was probably by nine o'clock in the morning. Isn't that correct?

[46]

A Well, there was some question in Pat's mind at that time because there was a discussion of this washing machine being left there in the driveway, or in the garage area, and it was not there. And Pat said for this reason he didn't know for sure whether his father had arrived or not.

Q Well, you thought probably he had been there at that point, didn't you?

A We thought possibly he had been there. There was an indication that he had left to come there.

Q Uh-huh. And you knew that he was—Well, strike that. Now, other than what Pat told you, did anybody that you interviewed that day before noon say—give you any indication that Mr. Murphy was in the city of Portland?

A In the telephone conversation with Mark Jones, he said that Murphy had left to come to Portland.

Q So this was another bit of evidence that made you think that Mr. Murphy was possibly in the city of Portland?

A Yes.

Q And that morning before noon Pat told you that there'd been some difficulty between his parents. Is that correct?

A Yes.

Q That was before noon?

A Yes.

Q Now, isn't it a fact, Detective Prunk, that in any manual strangulation case, that you as a homicide detective

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work on, if you see skin's been broken, the first thing that comes into your mind is the thought of physical evidence on the person doing the crime?

A Well, at that point there were two of us handling the investigation. And I don't know whether you've ever been to a homicide investigation, but there are just literally thousands of things that you have to do. And sometimes, after you do all these things, then you have to sit down and decide what you're going to do next. And—

Q Well, this isn't the first strangulation case you ever saw, is it?

A Yes, it is.

Q Is that right?

A Yes.

Q You've read about them; you're a trained detective, aren't you?

A Yes.

Q And you know that textbooks say the first thing—physical evidence is the first thing in a strangulation?

A Usually there's very little physical evidence in a strangulation.

Q Whenever there is is ofttimes under the fingernails?

A True.

Q But you didn't think of that at all until that evening?

A That's right.

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Q And, by four o'clock, there was no question in your mind but what Mr. Murphy had been there and had been in that driveway. Isn't that correct?

A By his own admission.

Q By his own admission and by the other things that you knew to be true. Isn't that correct?

A Yes.

Q And you testified, I believe, that sometime—you didn't have any idea of obtaining scrapings until between seven and ten.

A Actually, the thing of bringing—was brought up by Detective Hutchins, taking the fingernail scrapings.

Q You didn't think of it, he had to bring it up?

A He thought of it, yes. This is about the time it was brought up and discussed with Shiley.

Q Well, after Mr. Murphy got back over there, you didn't really learn anything you didn't already know, did you?

A He went into much more detail on his arriv—

Q Basically, he elaborated on what he already told you?

A Yes.

Q All right. So, other than the fact that he chose not to discuss the case with you any further, there was nothing that you learned after he arrived there that gave you any more cause to suspect him, is there?

A Well, as I say, the fact that he refused to discuss

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the case was the main thing, and the fact that he didn't ask what had happened, or didn't go into any questioning of us of what had happened, I thought it was very unusual.

Q But you assumed that he already knew from what had been told to him at the resort. The main thing that you were placing your idea on then was the fact that he chose not to discuss it with you. Is that the only additional factor?

A This is, I think, the big factor. All we had earlier was the fact that his wife was dead and he had been in the area, or had been there.

Q And, after he got to the Police Station, you didn't gain anything more, did you, other than the fact that he chose not to discuss it with you?

A That is what we mean.

Q So, by four o'clock, other than his refusal, you had everything that you based your decision to get scrapings on. Isn't that correct?

A No. As I said before, I think the thing that stood out mainly in our mind was the fact that he refused to discuss the case.

Q Excuse me. I meant, other than his refusal, you had everything by four o'clock.

A Yes.

MR. MacLAREN: I don't have anything further.

[50]

THE COURT: All right. Anything further?

MR. O'DELL: I don't believe so at this point.

MR. TANZER: (Shaking head in the negative.)

THE COURT: All right. I don't think we'll need any more testimony. You've got this in the record here, what happened here. Again, I'm going to do just what I indicated a few minutes ago. We're going to proceed after recess with voir diring the jury. And I've already indicated what I think the problem is here. Of course, four o'clock, that's when you established he had all this information. There's a thought process the Court has to take into consideration. It's brought out here in the evidence. There's one detective, two thousand things to do.

MR. O'DELL: Your Honor, Detective Hutchins is present and he could testify as to when the idea occurred to him, since he's the one who suggested it. And he can testify to what he saw on the defendant himself and his fingernails. Probably would—

THE COURT: Do you want to put that in the record?

MR. O'DELL: We can put that in, unless counsel is going to stipulate.

MR. MacLAREN: I'm not going to stipulate anything, Your Honor. If the Court wants to hear it,—

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THE COURT: Well, if he's here, I think we should —The question is one of first impression here. We want to get all in the record we can. Let's take a recess until eleven o'clock, Counsel, and reconvene here in Chambers.

(Recess.)

[52]

BENJAMIN PRESCOTT HUTCHINS, was thereupon produced as a witness on behalf of the State of Oregon and, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'DELL:

Q Now, for the record, Mr. Hutchins, your occupation.

A Detective, Portland Police.

Q And how long have you been a police officer?

A Twenty-seven years.

Q Now, were you working with Detective Prunk on the investigation of the death of Doris Murphy?

A I was.

Q And you were with him throughout the day. Is that correct?

A That is true.

Q Now, referring specifically to later on in the evening, do you recall seeing the defendant, Mr. Murphy, in this case?

A I do.

Q And where did you see him, please?

A At the Detective Office, Portland Police.

Q And do you recall, to the best of your recollection, about what time that was?

[53]

A Roughly, about a quarter to eight that evening.

Q Now, at some time during the course of this evening, certain fingernail scrapings were taken from the defendant. Do you recall approximately what time that was?

A Well, I'll say—I would have to estimate this, but I would say it was probably between nine or ten. Probably around nine.

Q Now, do you know, based upon who all was there involved in the investigation, whose idea it was to—to take these scrapings?

A I believe that I suggested that to Detective Prunk.

Q Now, can you tell me why you suggested this and what brought it to your attention?

A Well, I had, during the course of my contact with

the defendant, I had noticed his fingers. And I believe it was the right thumb, I noticed a dark spot.

Q Is this what prompted you to request the scrapings?

A That, and I probably would of anyway.

Q Now,—

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) Well, when you observed this thumb of the defendant, this dark spot referred to, what did you suspect that matter might be?

[54]

A Well, it, as blood congeals and gets older, it does get dark, and I thought there was a possibility.

Q Did you—Of course, you've stated that you were with Detective Prunk during the day. You had a chance to view the body?

A Yes.

Q And you saw the throat of the victim?

A Yes, I did.

Q And you were with him during the day, and the interview with his son, Patrick Murphy?

A Yes, I was.

Q And you were in the possession of all of the knowledge that Detective Prunk would have been at that time?

A I was.

Q Did you take into consideration—what other fac-

tors did you take into consideration in prompting you to make this request, other than just viewing that under the fingernail of the defendant?

A Well, originally, we had requested the defendant to come in for the purpose of ascertaining his background, what he had been doing during the course of the day, that immediate evening preceding the finding of the body, and also during the day of the death. And, upon his arrival there, he had showed, and during our conversation with him, had shown an attitude of disinterest in the case, which was unusual to me. I mean,

[55]

no worry about what had happened to his wife, or what we knew about it, or—just total disinterest.

Q Could I ask you: In your opinion as a police officer, 27 years' experience, based upon the totality of everything you knew, when did, in your mind, Mr. Murphy became a prime suspect in the death of his wife?

A Well, he had assumed this disinterest in what we had been doing toward solving it, what had—how the death had come about. And also, in our conversation with him, he had already been advised of his rights. And, shortly thereafter, he came out in the hallway and in front of a detective desk and stated that, while he was waiting for his attorney and off the record, he wanted to talk to us about just what he had done. He admitted in that statement that he had not heard a radio or—or a—or read a newspaper. And just his route of travel that

day was explained to us, that he had been in the driveway of the residence and he had slept there in his car in the driveway. He didn't want to disturb his wife by knocking on the door.

He slept there a short while and, eventually, got up out of his sleep in the car and was going to shove the car out; became stuck in a—back door has a small step that protrudes out into the driveway, and the car, apparently, in backing up, rolling back, had become lodged there. It was necessitated that he do start it up. And his admission that his car was a

[56]

loud and noisy thing; that, in starting, it would wake his wife up anyway. Everything seemed to go together, that—

Q At what point—

A —that probably he knew more than he was telling us.

Q At what point did this everything go together, as you say?

A Well, I would say while we were awaiting the arrival of Mr. MacLaren.

THE COURT: All right..

MR. O'DELL: That's all I have.

CROSS-EXAMINATION

BY MR. MacLAREN:

Q Now, Detective Hutchins, you were out on the crime scene that morning. Isn't that correct?

A (Nodding head in the affirmative.)

Q And you, of course, viewed the body?

A M-hm (nodding head in the affirmative).

Q And you viewed the lacerations on the neck?

A (Nodding head in the affirmative.)

Q And you, of course, have seen a number of strangulation homicides in your day, haven't you, sir?

A Yes, I have.

Q And isn't it true that one of the very first things

[57]

in this type of a case that a trained detective will think about is the securing of physical evidence by way of fingernail scrapings?

A It enters your mind, yes.

Q Well, that's one of the very first things. When you saw those marks there, you wondered if there was somebody walking around with this type of material underneath their fingernails?

A M-hm (nodding head in the affirmative).

Q And that was about between eight and nine a. m. Isn't that correct?

A Well, that and many other things enter your mind, too.

Q Well, all right. But this did, didn't it?

A Yes, it did.

Q And between eight and nine a. m. you talked to Pat Murphy?

A (Nodding head in the affirmative.)

Q Is that correct?

A Yes.

Q And didn't he tell you that he expected that his father was to be in town the preceding evening?

A Yes, he did.

Q Did he tell you about the telephone call that he heard one end of the conversation?

[58]

A That's true.

Q So he knew that his dad was due in town?

A Yes, he did.

Q And you talked to him about having heard some form of motor noise outside his window sometime during the night.?

A Yes.

Q All right. And had he also told you some—some story about a difficulty between his parents at an earlier time?

A Yes, he did.

Q Did he tell you that there'd been some violence?

A Yes.

Q What'd he tell you?

A That his father and his mother had a physical argument approximately a year preceding this.

Q Did he tell you anything about the details thereof?

A That she'd been bruised.

Q Where?

A Oh, the upper parts of the body (indicating).

Q The chest, or where?

A Oh, around the face and neck area.

Q All right. And now, were you present when Detective Prunk talked to Mark Jones earlier, sometime around noon that day? Did you hear his end of the conversation?

A No, I didn't.

[59]

Q All right. So you don't know what—what information Detective Prunk imparted to Mark Jones, do you?

A No.

Q You don't know whether or not Detective Prunk told Mark Jones around noon that strangulation was the suspected cause of death?

A I couldn't say, no.

Q In any event, you, by noon, you were of a mind that Mr. Murphy was probably in the city of Portland sometime during the preceding night, weren't you?

A We had reason to believe that he probably had been.

Q Well, you had reasonable reason to believe that, didn't you?

A Well, we wanted to verify it with him. That's why the phone call.

Q Well, that was the only thing that remained to be done, just confirm it in your mind. Isn't that correct?

A Wasn't the only thing remained to be done.

Q I mean on this point.

A On that point, yeah.

Q So, by noon, you suspected or had good reason

to believe that Mr. Murphy had been in town that preceding evening, right?

A Suspected, yes.

Q All right. And that he had—there was somebody in

[60]

the driveway, and it was probably Mr. Murphy?

Yes.

Q And that there had been a strangulation; that whoever had done this, had broke the skin. Is that correct?

A Probably.

Q Excuse me?

A Probably; in all probability, yes.

Q Well, you know that the skin was broken—

A Yes.

Q —and you knew it at that time, didn't you?

A We didn't know—Mr. Murphy—

Q Excuse me. You misunderstand me. By noon you know this dead person, the skin had been broken around their neck?

A Yes.

Q And that blood had been drawn?

A Yes.

Q And all of this happened by noon and, by four o'clock, you had it confirmed that Mr. Murphy was in town, through his own statement to Detective Prunk. That's correct, isn't it?

A M-hm (nodding head in the affirmative).

Q All right. So between then and—from then on you learned nothing, as far as a factual nature is concerned; you learned nothing about the case, other than maybe had it elaborated a little bit more upon by Mr. Murphy?

[61]

A Excuse me. Going back: How did you word that? At four o'clock—?

Q I probably stated it badly, Mr. Hutchins. From four o'clock on, you learned nothing new about the case from Mr. Murphy, did you, other than he elaborated a little bit more on his activities?

A Well, I was—that was the phone call that he had with Mr. Prunk.

Q All right. I'm talking about you and Mr. Prunk learned nothing. He just elaborated a little more when he got over here, didn't he?

A Yeah, he elaborated a little more on his story.

Q That's about the extent of what you learned from Mr. Murphy?

A Well, offhand, we found out, in his elaboration, where he had been that preceding night, and a little more the stops that he had made.

Q But, again, this was just mainly elaboration on the four o'clock conversation?

A As far as told to me by Detective Prunk. I wasn't in on the phone call.

Q All right. From what you learned, it was just an

elaboration on what Detective Prunk had told you previously?

A Yeah.

Q All right. And, as to this spot under the thumbnail,

[62]

which thumbnail was it?

A The right thumbnail.

Q The right one?

A (Nodding head in the affirmative.)

Q All right. And you weren't able to determine what that was, and you had to dig this material out before you could tell anything about it. Is that correct?

A Oh, I wouldn't definitely say what it was, no, until after it was examined.

Q Until after you searched it out from underneath his thumbnail?

A Yes.

Q Now, this attitude of disinterest, you don't know what Mr. Murphy had been told when he got back to Metolius Resort and before he called Detective Prunk, do you?

A No, I had no way to know what he was told.

Q And the very first time that you had any thought of scraping the fingernails was sometime around what time?

A After his arrival in the Station there.

Q But you testified that, regardless of this dark spot, you probably would have done this anyway.

A That gave me more focal point to do it, but I, if I had not seen it, I probably would have anyway.

Q There's no question in your mind you would have wanted to do this anyway?

[63]

A I would have considered it good, proper police work.

Q In fact, you, as early as in that morning, when you saw the lacerations on the neck, you would consider it good police work to take scrapings from any suspect, wouldn't you?

A I would have anyway, yes.

Q You looked at the fingernails of Pat Murphy, didn't you?

A That was impossible to do.

Q All right. So you ruled that out?

A (Nodding head in the affirmative.)

Q So you wanted at that time to take Mr. Murphy's fingernail scrapings, didn't you?

A I hadn't thought it right then, but—

Q I'm sorry. What?

A I hadn't thought of it right then, no.

Q Didn't you think of it sometime before five—

A There's so many things to do in a murder, homicide investigation, a lota things go through your mind.

Q By four o'clock?

A Then—then, when I decided on it, it was probably a lot later than that.

Q By five o'clock do you think you thought about it?

A (Shaking head in the negative.) It would be an assumption if I did.

Q You don't know?

A I just don't know.

Q But it would be good police work, wouldn't it? By the time four o'clock rolled around and you knew for a fact Mr. Murphy had been in town, wouldn't it be good police work at that time to think about his fingernails?

A Yes, I think so.

Q And essentially you had information at four o'clock that you had at any other time that day, didn't you?

A Not quite.

Q Other than what?

A His lack of interest upon his arrival there, what had occurred to his wife.

Q All right. Let me ask you this: If it hadn't been for this lack of interest, you still would have wanted to take those fingernail scrapings, wouldn't you?

A Well, there's good reason for that, m-hm.

Q You would have, wouldn't you?

A I would of.

Q And, regardless of the dark spot that you thought you saw, you would have taken—wanted—

A I did see a dark spot.

Q Pardon?

A I did see a dark spot.

Q I say, regardless of that, you would have anyway,

[65]

wouldn't you?

A Probably would have.

Q All right. So, as far as what happened after four o'clock, really nothing happened that would have changed your mind about taking the scrapings. Do you follow me?

THE COURT: You've asked that several times now.

MR. MacLAREN: All right. I'll withdraw it, Your Honor. I think the Court is—

THE COURT: I got what I want to know.

MR. O'DELL: Just a couple of questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. O'DELL:

Q Now, prior—based upon the telephone call, of course, you couldn't see the defendant, could you?

A No.

Q And you first saw him physically when he arrived at the Station?

A I did.

Q Is that the first time you had a chance to examine his demeanor and his attitude toward the situation?

A That's true.

Q Is that, in fact, when you first saw his fingernail?

[66]

A That's true.

Q And is this the first time you had a chance to ob-

serve his actions and what he did, actually, regarding this matter?

A This is true.

Q And did you ask him whether or not he would discuss this matter with you after having advised him?

A Yes.

Q And he refused. Is that correct?

A He refused.

Q Did he make any other refusals upon which you based this suspect determination? Did you ask him if he'd do anything else, other than talk to you?

A Yes, sir, I asked him on the fingernail scrapings.

Q Did you ask him about anything else?

A Yes, I did.

Q What was it?

A Polygraph examination.

Q What did he say —

MR. MacLAREN: Your Honor, I'm going to object to that because, regardless of his yes or no about polygraph examination, this isn't something that he can base probable cause on. It's clearly inadmissible.

THE COURT: A lot of this is inadmissible in a court of law out here.

MR. MacLAREN: I think this is the same

[67]

type of thing, of them making probable cause out of the fact that he didn't want to give up his Constitutional rights.

THE COURT: That's fine. I know it's the same

way. I'm sure you notified him. If he got in touch with you, I assume, on cross-examination, that somebody told him not to say a thing, which is right, but that's a matter for the Court to determine here.

People can still tell a police officer here, "I'm not going to speak. I'm aware of my rights." It can still be a matter of impression. That's what I gather from the detectives here.

All right. Do you have anything further?

MR. O'DELL: It's my position, Your Honor,—

THE COURT: Go ahead. I'll leave it in.

MR. O'DELL: —the totality included all these factors. He did not become a prime suspect until that point. It's fine to take a fingernail scraping from someone, but you can't do it until you have probable cause.

THE COURT: I know. That's the thrust of your argument.

MR. O'DELL: That's all I have.

THE COURT: All right. Gentlemen, as I indicated before, the Court is going to take this matter under advisement. * * *

* * * * *

[**(b) Ruling on Motion To Suppress Evidence**]

[**73**]

Tuesday, December 12, 1967
9:30 A. M.

MORNING SESSION

(Whereupon the following proceedings were had in camera:)

THE COURT: Good morning, gentlemen.

MR. O'DELL: Good morning, Your Honor.

THE COURT: Before we proceed further with this trial, as I indicated to you yesterday, I would take this motion, defendant's motion, under submission. And I have studied it and considered the argument and testimony presented by respective counsel on your motion, Mr. MacLaren, to suppress, and feel that the motion should not be allowed.

Now, I will agree with you that the scraping of the defendant's fingernails, as far as this Court is concerned, for evidence, was a search within the meaning of the search and seizure law. Of course, that leaves the crucial question of whether or not the search was a reasonable and valid one.

You will recall that yesterday I indicated that I felt quite strongly that probable cause existed, in this case, for the search. And, add to that, since you finished arguing yesterday, I further feel that, and I think I indicated, the exigencies of the situation, or the circumstances, including the purpose of the search, the manner in which it was made,

[74]

the character of the evidence seized, and the nature and the importance of the crime committed, all add to the reasonableness of the search.

And I further feel that State versus Ramon, [248 Or. 96, 432 P.2d 507 (1967),] cited to the Court by the District Attorney yesterday, * * * support my finding. And you will recall in that case the Court said that:

"It is not answer to say that the police could have

obtained a search warrant for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

And, for these reasons, the Court is hereby denying the motion. * * *

* * * * *

[**(c) Preservation of Exception during Trial**]

[**344**]

Thursday, December 14, 1967
9:42 A. M.

MORNING SESSION

(Whereupon the following proceedings were had in camera:)

MR. MacLAREN: For the purposes of the—protecting the defendant's record here, it is agreed between counsel for the State, Mr. O'Dell, and myself, as counsel for the defendant, in the presence of the Court, that, by defendant's failure to object to the introductilon of State's Exhibit 23, which—and 25—

MR. O'DELL: '6, excuse me, excuse me. Twenty-six.

MR. MacLAREN: Correction: 26—which exhibits contained the fingernail scrapings obtained from the defendant, by not objecting, the defendant did not waive his prior objection, which was in the form of the motion to suppress, which the Court has ruled on, and overruled.

THE COURT: That's right; that's right. By failing to object, you didn't waive any of your rights. * * *

* * * * *

OPINION OF U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DANIEL P. MURPHY, Petitioner,	)	Civil No. 70-883
vs.	)	OPINION
HOYT C. CUPP, Superintendent, Respondent.	)	June 2, 1971

Howard R. Lonergan,
812 Executive Building,
Portland, Oregon 97204,

Attorney for Petitioner.

Lee Johnson,
Attorney General,
Jim G. Russell,
Assistant Attorney General,
State Office Building,
Salem, Oregon 97310,

Attorneys for Respondent.

SOLOMON, Judge:

Daniel P. Murphy was found guilty in the state court of second degree murder. The Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. He seeks habeas corpus relief here. 28 U.S.C. §§ 2241 et seq.

On the day that Murphy's wife was strangled, the police asked Murphy to report to them for questioning. He came, but objected when the investigating officers requested scrapings from his fingernails. Scrapings were taken and used against him at trial.

He contends that the admission of this evidence violated his federally protected constitutional rights because the scrapings were taken without a warrant and not incident to arrest.

The opinion in the Oregon Court of Appeals reports the circumstances of Mrs. Murphy's death and Murphy's arrest in detail. The Court approved the trial court's finding that the fingernail scrapings were admissible. *State of Oregon v. Murphy,* 90 Or. Adv. Sh. 679, 465 P.2d 900 (Or. App. 1970).

The facts of this case are not disputed. Murphy submitted his petition solely on the state court record. I have reviewed the record. I find that he had a full and fair hearing not only on his motion to suppress but also in the other proceedings in the trial and appellate courts. 28 U.S.C. §§ 2254 (d); *Townsend v. Sain,* 372 U.S. 293, 312-313 (1963).

I agree with the reasoning of the unanimous opinion in the Oregon Court of Appeals. The investigating officers had probable cause either to get a search warrant or arrest Murphy. Instead, they merely obtained fingernail scrapings, which Murphy could have destroyed easily if given the opportunity.

The petition is denied.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 (a).

Dated this 2nd day of June, 1971.

/s/ Gus J. Solomon
United States District Judge

JUDGMENT OF U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DANIEL P. MURPHY,	)	
	)	
Petitioner,	)	Civil No. 70-883
	)	
vs.	)	JUDGMENT
	)	
HOYT C. CUPP, Superintendent,	)	ORDER
	)	
Respondent.	)	

Based upon the findings of fact and conclusions of law in the opinion of the Court dated this day, the petition for writ of habeas corpus is dismissed.

Dated this 2nd day of June, 1971.

/s/ Gus J. Solomon
United States District Judge

OPINION OF U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL P. MURPHY,)
)
Petitioner-Appellant,)
)
vs.) No. 71-2203
)
HOYT C. CUPP,)
)
Respondent-Appellee.)

[May 30, 1972]

Appeal from the United States District Court for the District of Oregon

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Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

PER CURIAM:

Murphy is an Oregon state prisoner, convicted of second degree murder. After having exhausted his state remedies, he filed a petition for habeas corpus relief in the District Court, alleging therein that he had been the victim of a search proscribed by the federal constitution. The District Court denied the petition, and this appeal followed.

The victim of the homicide was Murphy's wife, and sometime after her body was discovered, Murphy and his attorney were present in the station of the investi-

gating police officers. The police expressed a desire to take scrapings from Murphy's fingernails. Acting upon the advice of his attorney, made in the presence of the police, Murphy protested, claiming that such a search would be illegal. The police insisted, and Murphy, declining to provoke violence, submitted to the search while, at the same time, expressly reserving his right to continue, in the future, to urge that the search was constitutionally impermissible. Thereafter, in the state court trial that culminated in Murphy's conviction, the prosecution introduced the scrapings into evidence over Murphy's objection.

The appellee has conceded that Murphy was not under arrest at the time the challenged search was made, and our review of the record convinces us that there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant. *See Vale v. Louisiana,* 399 U.S. 30, 34-35, 26 L. Ed. 2d 409, 413-14, 90 S. Ct. 1969, 1971-72 (1970); *Schmerber v. California,* 384 U.S. 757, 770-71, 16 L. Ed. 2d 908, 919-20, 86 S. Ct. 1826, 1835-36 (1966). Thus, the search was illegal. *See Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 22 L. Ed. 2d 676, 681, [sic] 91 S. Ct. 2022, 2031-32 (1971). *Cf. Davis v. Mississippi,* 394 U.S. 721, 727-28, 29 L. Ed. 2d 564, 575-76, [sic] 89 S. Ct. 1394, 1397-98 (1969).

Upon remand, the District Court will hold Murphy's

petition in abeyance for a reasonable time, not exceeding sixty days, in order to afford the Oregon authorities the opportunity to retry Murphy, should they choose to do so, without the introduction of the impermissible evidence.

Reversed and remanded.

JUDGMENT OF U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL P. MURPHY,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 71-2203
	)	
HOYT C. CUPP,	)	
	)	
Appellee.	)	

APPEAL from the United States District Court for the District of Oregon[.]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered May 30, 1972[.]

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Title omitted in printing]
[July 6, 1972]

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

OPINION OF OREGON COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,)
)
Respondent,)
)
v.)
)
DANIEL PAUL MURPHY,)
)
Appellant.)

[March 12, 1970]

Before SCHWAB, Chief Judge, and LANGTRY and FOLEY, Judges.

AFFIRMED.

SCHWAB, C. J.

The defendant was tried to a jury on the charge of murder of his wife. He was convicted of murder in the second degree. On appeal he contends that fingernail scrapings taken from him against his will were wrongfully received in evidence. The state produced testimony that analysis of the scrapings revealed skin, blood cells, and white cotton fiber. This evidence was obviously introduced as tending to prove that the defendant had acquired these substances under his fingernails by strangling his wife while she was in bed.

At the time the police took the fingernail scrapings they had not formally arrested the defendant. He was not charged with murder or any other crime until about

a month later. The defendant's position is that the police did not have a right to search him by taking scrapings from his fingernails without his consent and without a warrant except as incident to a lawful arrest.

We borrow in large part from the statement of facts in defendant's brief.

On August 25, 1967, City of Portland detectives, Hutchins and Prunk, were assigned to investigate the murder of Doris Murphy. They arrived at the Murphy home shortly after 8 a.m. They could see throat lacerations and abrasions and it appeared to the detectives that Mrs. Murphy had been strangled. The deceased was lying on her back in bed and the bed was perfectly made up. There was no signs of forced entry, struggle, or robbery. The dectectives talked to the son of the deceased and defendant. The son told them that the defendant had been away and had been expected home the night of August 24. By making a telephone call to Camp Sherman, Oregon, and talking to a Mr. Jones, the detectives learned that the defendant had left Camp Sherman on the night of the 24th to go to Portland. They also learned from defendant's son that the deceased and the defendant did not get along well and in the past "had fights." While talking to the son the detectives noticed that he had "no fingernails." Through Mr. Jones Detective Prunk left a death message at Camp Sherman for defendant.

At 4 p.m. on the same day, August 25, defendant called the Portland police station and talked to Detective

Prunk. Without asking any questions about his wife defendant immediately began to tell Prunk where he had been the night before. He also agreed to come to Portland immediately. Defendant told Prunk on the telephone that he had left Camp Sherman about 8 p.m. the night of the 24th in his old pickup to bring a washing machine to Portland to be repaired and on the way had stopped in Salem for a couple of drinks. When he got home the door was locked so he slept in the pickup parked in the driveway. Early in the morning he woke up and tried to push the truck out of the driveway because it made a lot of noise, but it got caught in the step or curb. He then drove off to another place where he slept until daylight and then took the washing machine to be repaired.

The defendant did return to Portland and went to the Portland police station about 7:45 p.m. When Detective Hutchins saw the defendant in the police station he noticed a dark spot on defendant's right thumb. This prompted him to think about fingernail scrapings although, as he put it, he probably would have anyway in view of the fact that he had observed lacerations on the throat of the deceased. While the defendant and the detectives were discussing the case, two lawyers representing the defendant arrived. The discussion continued after the lawyers arrived and during this time a deputy district attorney who was present and the two detectives discussed taking fingernail scrapings. The defendant refused to give the fingernail scrapings or to take a poly-

graph test and exhibited a disinterest in the case. Nevertheless, the police detained the defendant long enough to take the scrapings in question and then released him.

1. By holding the defendant long enough to take fingernail scrapings from him, the detectives did not *arrest* the defendant in the strict sense of the word. An *arrest* in its strict sense is the taking of a person into custody for the commission of an offense as the prelude to prosecuting him for it. *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). It follows that the state cannot rely on the rule that "The notable exception to the demand for a search warrant is, of course, the search made as an incident of a lawful arrest." *State v. Chinn*, 231 Or 259, 373 P2d 392 (1962). This rule, however, is not determinative of the case at hand for, while the incident-to-arrest exception is "notable," it does not follow that it is exclusive.

> "* * * In terms of the quantum of evidence required, this [probable cause for a search] is substantially the equivalent of the probable cause needed for an arrest warrant and of the reasonable grounds needed for an arrest without warrant." LaFave, *Search and Seizure: The Course of True Law * * * Has Not * * * Run Smooth*. 255 Ill L Forum 259-60 (1966).

2. In the usual situation, as in this case, the same evidence that constitutes probable cause to arrest constitutes probable cause to search the person arrested for evidence of the crime for which he is seized. Perhaps this is the reason that in many cases courts have upheld

warrantless searches which came prior to arrest by characterizing the searches as "incident to arrest."

"Search before arrest is not uncommon in current practice. In some instances, the search precedes the formal announcement of arrest because it is necessary for the officer to act quickly for his own protection. In many instances, however, no formal announcement is made because the officer knows that the person will not actually be taken to the station unless the search proves to be fruitful. That is, in those cases where the defendant might be arrested because of reasonable grounds to believe he presently possesses contraband, the common sense sequence—as far as the police are concerned—is search followed by arrest only if contraband is found, as opposed to arrest, search, and then release if nothing is found.

"In these and similar cases, the better view is that the search is not unlawful merely because it precedes the arrest. Such is the California position, which has been explained as follows:

" 'Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it.'[284]"

"* * * * *.

"[284] People v. Simon, 45 Cal. 2d 645, 648, 290 P.2d 531, 533 (1955)." LaFave, *Search and Seizure* * * *, supra, at 303.

The majority of the Oregon Supreme Court apparently is of the same mind as the California court in *People v. Simon*, 45 Cal2d 645, 290 P2d 531 (1955). In *State v. Elk*, 249 Or 614, 439 P2d 1011 (1968), those who concurred in the prevailing opinion characterized as incident to arrest a car search which occurred 20 to 25 minutes prior to arrest and 200 to 250 yards away. The search was upheld on the basis of a more realistic, workable and theoretically sound rationale in two concurring opinions which represented the views of four concurring justices. While the two concurring opinions were not in complete agreement on all of the issues of that case they shared the same view on the issue we are here considering. The view upon which the four concurring justices agreed is set forth in that portion of Mr. Justice O'CONNELL'S opinion which states:

> "The majority opinion upholds the search in the present case on the ground that it was incident to the arrest. This is erroneous. A search and seizure cannot be an 'incident' of an arrest which took place at a later time. It is not made any the more so by assertions that "the arrest and search were part of one uninterrupted transaction' or that the search is 'not remote in time or place from the site of the arrest.'
>
> "However, the search and seizure in the present case can be upheld upon another ground. The information Officer Rothermel had received, together with his observations before lifting the trunk lid, was sufficient to give him probable cause to believe that the

stolen gun was in the trunk. Upon the basis of this information, there would have been no difficulty in obtaining a search warrant. But to obtain a warrant it would have been necessary for Rothermel to leave the car and if he left it he could not know when the person who drove the car there would return and drive it away together with the evidence in it. Rothermel had been informed that those who had driven up in the car were in the immediate vicinity. Because of the risk of losing the evidence if a warrant were sought, it was impracticable to obtain a warrant. Under these circumstances a search of the trunk was reasonable." *State v. Elk*, supra, at 624-25.

3. If the police had probable cause to search the defendant and probable cause to believe that it was necessary that they search him without taking the time to first obtain a search warrant, their right to search him immediately was not defeated by their failure to exercise their right to arrest him. "There is no constitutional right to be arrested." *Hoffa v. United States*, 385 US 293, 87 S Ct 408, 17 L Ed 2d 374, reh den 386 US 940 (1966). To hold otherwise would be to require the police to arrest so as to search incident to that arrest. The court should not require greater invasion of privacy where lesser invasion would satisfy the public purpose. Situations exist where arrest would be unwise despite the circumstances of probable cause. Cf. *Hoffa v. United States*, supra. While the existence of probable cause authorizes state seizure by way of (1) arrest, and (2) search to prevent destruction of evidence (see *State v. Chinn*, supra, at 267), there appears no reason to require the police to do both or neither. If the public safety is

satisfied by the lesser invasion of defendant's privacy, by search alone, the law should not encourage, or indeed require, the police to arrest prematurely in order to justify a search already justified by prior probable cause.

4. We hold that the right of the police to search without a warrant is a right not solely dependent upon a prior or contemporaneous arrest. The relevant issue is not whether the defendant was arrested, but whether the warrantless search was based on probable cause. The questions basic to this determination are:

> (1) Did the police have probable cause to believe that a search of the defendant's person would result in the finding of evidence of homicide?
>
> (2) Did the police have probable cause to believe that if the search were not made immediately without taking the time to seek and obtain a warrant the evidence might well be lost?

State v. Keith, 2 Or App 133, 465 P2d 724, Sup Ct.

5. The facts in the case at hand justified the warrantless search. At the time the police took the fingernail scrapings they had probable cause to believe that the defendant was guilty of strangling his wife. They did not have evidence beyond a reasonable doubt, but they did have what they needed, i.e., reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief. *State v. Keith*, supra.

One of the detectives who had had previous experience in this type of homicide knew that throat lacerations were frequently produced by fingernails and that evidence in the form of blood, skin and fibers could

sometimes be found under the fingernails of assailants in such cases. At the time the detectives took these scrapings they knew:

> The bedroom in which the wife was found dead showed no signs of disturbance, which fact tended to indicate a killer known to the victim rather than to a burglar or other stranger.
>
> The decedent's son, the only other person in the house that night, did not have fingernails which could have made the lacerations observed on the victim's throat.
>
> The defendant and his deceased wife had had a stormy marriage and did not get along well.
>
> The defendant had, in fact, been at his home on the night of the murder. He left and drove back to central Oregon claiming that he did not enter the house or see his wife. He volunteered a great deal of information without being asked, yet expressed no concern or curiosity about his wife's fate.

Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. The search of the defendant did not violate his constitutional rights to freedom from unreasonable search and seizure.

Affirmed.

Supreme Court of the United States

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

Daniel P. Murphy

ORDER ALLOWING CERTIORARI. Filed December 4 ---------- , 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted.